Petition

NO. 81-1132

FILED
DEC 15 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1981

JAMES KELLY,

Petitioner

VS.

STATE OF LOUISIANA

Respondent

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF THE STATE OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the Supreme Court of the State of Louisiana failed to apply the correct federal constitutional standard in finding a state conviction valid for purposes of enhancement of punishment under a state recidivist statute.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

No.

JAMES KELLY,

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VS.

STATE OF LOUISIANA

Respondent

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT
OF THE STATE OF LOUISIANA

James Kelly, petitioner herein prays that a writ of certiorari issue to review the judgment entered in this criminal case on September 8, 1981 and application for rehearing denied on October 16, 1981.

OPINIONS OF THE COURT BELOW

The opinion of the Supreme Court of Louisiana is reported at —So.2d—(La.1981) and is reproduced in the appendix.

JURISDICTION OF THE SUPREME COURT

The judgment of the Supreme Court of the State of Louisiana was rendered on September 8, 1981. The application for rehearing was filed on September 22, 1981 and denied by the Supreme Court of the State of Louisiana on October 16, 1981. Title 28 United States Code, Section 1257(3) confers jurisdiction on this Court to review the judgment in question by a writ of certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or

> limb; nor shall be compelled in any criminal case to be a witnessed against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

person of life, liberty or property without due process of the law; not deny to any person wihtin its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

On August 24, 1978 officers of the New Orleans Police Department served a search warrant on 2705 Belmont St., Apartments "E" and "F", New Orleans, Louisiana, A quantity of Dilaudid and Preludin was seized from apartment "F". Defendant JAMES KELLY was present in Apartment "F" at the time of the search and seizure. He was arrested and charged with possession of narcotics with intent to distribute, in violation of La. R.S. 40:969. Defendant KELLY was tried before a twelve person jury on November 21 and 22, 1978. The jury returned a verdict of guilty as charged. Following a hearing on June 18, 1979 defendant JAMES KELLY was adjudicated a multiple offender and sentenced to serve twenty years at hard labor. His conviction was affirmed by the Supreme Court of Louisiana on September 8, 1981 and application for rehearing denied on October 16, 1981.

ARGUMENT

The State of Louisiana charged petitioner JAMES KELLY as a multiple offender under La. R.S. 15:529.1. The trial court ruled that the sentence could

be enhanced under that statute based on a 1963 and a 1972 conviction.

Petitioner asserted that the 1963 conviction should not be used for enhancement of punishment under the State's multiple offender statute because he was not represented by counsel at the time of the plea of guilty. *Burgett v. Texas*, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed 2d 319 (1967). *United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed 592 (1972). In the opinion below the Supreme Court of the State of Louisiana noted that the defendant was entitled to waive the presence of counsel when entering a plea of guilty. However, the record failed to reflect a waiver of the consitutional right to counsel at the time the guilty plea was accepted by the trial court. *See Carnley v. Cochran*, 369 U.S. 506, 82 S.Ct. 884, 8L.Ed 2d 7 (1962); *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed 2d 274 (1969). The 1963 conviction was constitutionally infirm and could not validly be used to enhance the penalty imposed in the instant conviction. *Gideon v. Wainwright*, 732 U.S. 335, 83 S.Ct. 792, 9 L.Ed 2d 799 (1963); *Burgett v. Texas, supra.*

The 1972 conviction used to enhance the penalty of defendant-petitioner was also constitutionally invalid. Defendant-petitioner KELLY entered a guilty plea to a July 23, 1972 felony offense and was sentenced to 30 months imprisonment. (Orleans Parish

Criminal District Court Docket Case No. 229-396). He was sentenced as a multiple offender on June 18, 1979 using this 1972 plea for purposes of enhancement of sentence.

An examination of the 1972 plea of guilty form (La. Appeal Record, page 66) and an examination of the contemporaneous transcript of the December 28, 1972 plea of guilty in matter no. 229-396. (La. Appeal RECORD, page 68 to page 74) reveals that there was no affirmative showing through the contemporaneously recorded transcript that the plea was voluntary and made with an awareness of its consequences, and particularly with an awareness of the waiver of the privilege against self-incrimination, as discussed in *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed 2d 274(199), and the waiver of compulsory process under the Sixth Amendment of the U.S. Constitution, as discussed in *State v. Lewis*, 367 So.2d 1155 (La. 1969).

On the date of KELLY'S sentence as a multiple offender, June 18, 1979 *State v. Lewis*, 367 So.2d 1155, was in effect *Lewis* established the Louisiana requirement that the minutes or transcript of the plea of guilty affirmatively disclosed that the accused had waived his right to jury trial, his right to confront his accusers, and his privilege against self-incrimination. *See also State v. Holden*, 375 So.2d 1372 (1979).

Thus, the 1972 conviction was invalid under federal constitutional standards as enunciated in *Boykin* and applied in Louisiana through *State v. Lewis* and *State v. Holden.*

The present case reflects an incorrect application by the State of Louisiana of the constitutional guarantees provided in the Fifth, Sixth, and Fourteenth Amendments. Since the Supreme Court of Louisiana has decided a federal constitutional question in a way conflicting with the applicable decisions of this Court, sound discretion should be exercised to grant certiorari herein.

RESPECTFULLY SUBMITTED:

WILLIAM NOLAND

CERTIFICATE OF SERVICE

I hereby certify that the foregoing petition for a writ of certiorari has been served upon the State of Louisiana by placing the appropriate number of copies of the same in the U.S. Mail, postage prepaid, addressed to HARRY CONNICK, District Attorney for the Parish of Orleans, State of Louisiana at 619 So. White Street, New Orleans, La. 70119 on the 15th day of December, 1981. .

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Appendix

SUPREME COURT OF LOUISIANA

NO. 81-KA-0033
STATE OF LOUISIANA
VERSUS
HARDEN JOHNSON AND JAMES KELLY

ON APPEAL FROM THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, STATE OF LOUISIANA, HONORABLE RUDOLPH F. BECKER, III, JUDGE

WATSON, Justice.*

Defendants, Harden Johnson and James Kelly, were charged by bills of information with two counts of possession with intent to distribute controlled dangerous substances, to wit: Preludin and Dilaudid. A jury found James Kelly guilty as charged and Harden Johnson guilty of possession.

* Judges Frederick Stephen Ellis, Morris A. Lottinger, Jr. and Elven E. Ponder of the Court of Appeal, First Circuit participated in this decision as Associate Justices Ad Hoc joined by Justices Calogero, Dennis, Watson, and Lemmon.

Kelly was adjudicated a third offender and sentenced to twenty years at hard labor on Count I and ten concurrent years at hard labor on Count II. Johnson was sentenced to three concurrent years in Parish prison on each count. The two defendants have appealed their convictions and sentences.

FACTS

Search warrants were issued for apartments E and F in the Magnolia Housing Project. Two officers banged on the back door of apartment E and Harden Johnson existed through the front door of Apartment F into the arms of two other police officers. There are separate stairwells for the front and rear entranxes of the two third floor apartments. The officers entered apartment F with Johnson and discovered James Kelly in the bathroom attempting to dispose of a bottle marked Vitamin C. The bottle which was removed from the commode contained eighty yellow tablets and forty-eight pink tablets. The yellow pills were Dilaudid, a trade name for dihydromophinone, which is an opium derivative or "downer". The pink pills were Preludin (phenmetrazine) a stimulant or "upper". The testimony was that Preludin tablets have a street value of approximately $18 each and Dilaudid tablets have a street value from $35 to $55 each. Apartment F is the residence of Harden Johnson. James Kelly was a visiting friend. Also ar-

rested in apartment F was Carlin Morgan. A brown lady's purse in apartment F contained $316.00.

The bills of information charge the crimes under the wrong statute. Both Preludin or phenmetrazine, and Dilaudid are Schedule II drugs. LSA-R.S. 40:964. Defendants were charged with possession and intended distribution of Schedule IV drugs under LSA-R.S. 40:969, whereas they should have been charged under LSA-R.S. 40:967, which deals with Schedule II drugs.

The Louisiana Constitution of 1974 in Article 1 §13 provides that an accused in a criminal prosecution shall be informed of the nature and cause of the accusation against him. An information is a written accusation of crime. LSA-C.Cr.P. art. 384. It must inform the defendant of the statutory basis of his offense. *State v. Gainey*, 76 So.2d 1240 (La.,1979). However, clerical errors in statutory citations do not warrant reversal of convictions. *State v. Hamilton*, 297 So.2d 419 (La., 1974). If an indictment states the essential facts of an offense charged, an error or omission in the statutory citation does not require reversal of a convicton if the error or omission did not mislead the defendant to his prejudice. LSA-C.Cr.P. art. 464. The trial allowed the State to amend its answer to defendants' bill of particulars to show that the correct statute is LSA-R.S. 40:967. Defendants were misled by the erroneous citation and the fact that they were

charged under the wrong statute is not ground for reversal of their convictions. *State v. James*, 305 So.2d 514 (La., 1974).

ASSIGNMENT OF ERROR NUMBER ONE

Defendants contend that the trial court erred in restricting their inquiry into the reliability of the confidential informant whose information provided the basis for police surveillance, the affidavit and the search warrant. State objections were sustained to various questions about the informant. There were no contemporaneous objections to the rulings, and the alleged errors cannot be raised on appeal. LSA-C.Cr.P. art. 841.[1]

This assignment lacks merit.

1. LSA-C.Cr.P. art. 841 provides:
"An irregularity or error cannot be availed of after verdict unless it was objected to at time of occurence. A bill of exceptions to rulings or orders is unnecessary. It is sufficient that a party, at the time the ruling or order of the court the action which he desires the court to take, or of his objections to the action of the court, and the grounds therefor.

"The requirement of an objection shall not apply to the court's ruling on any written motion."

ASSIGNMENT OF ERROR NUMBER TWO

Defendants contend that the trial court erred in not allowing a question about evidence seized relating to other persons arrested at the same time as Johnson adn Kelly. There was no contemporaneous objection. LSA-C.Cr.P art. 841, supra.

This assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER THREE

Defendants contend that the evidence seized should have been suppressed because the search warrant is defective on its face and does not establish probable cause for the search.

The search warrant initially described the premises as 2705 Belmont Street, apartment D. The D was crossed out and replaced with a handwritten F. The correction was initialled by the magistrate and the two affiants. It is contended that the handwritten F resembles a C and this causes an ambiguous discrepancy which is fatal to the warrant's validity.

F rather than C is the correct letter. Apartments E and F had been under surveillance. A separate warrant had been executed for E. This warrant could not reasonably have authorized the search for of

any apartment other than F. Officers McNeil and Peralta, who had conducted the surveillance and executed the affidavits, knew that the two apartments to be searched were E and F. They were executing the warrant for apartment E, while other officers were executing the warrant for apartment F, the only other third floor apartment. There were no danger of the wrong premises being searched and the description is therefore not deficient. *State v. Cobbs*, 350 So.2d 168 (La. 1977). The alteration did not invalidate the warrant. *State v. Welsh*, 371 So.2d 1314 (La., 1979).

It is also contended that the affidavit did not establish probable cause for the search. The affidavit recites that a reliable confidential informant had been presents in Apartment E, the residence of Sharon Rudolph, and discussed obtaining Dilaudid. Rudolph was given money by the informant, went to apartment F, her sister's residence, returned to apartment E and produced the purchased narcotics. Rudolph advised the informant that she had to conceal the drugs in her sister's residence because the police were watching her. The informant was told drugs could be obtained when Rudolph was not at home directly from her sister in apartment F. Officers McNeil and Peralta undertook surveillance of apartments E and F and observed various people enter and exit the two apartments on Wednesday, August 23. The surveillance was limited and the detectives, according to their

testimony on the motion to suppress, could not see the entrance of apartment F. The informant advised by telephone on Thursday, August 24, that he had returned to apartment E but Sharon Rudolph was not at home. The informant knocked on the apartment F door of her sister, Harden Johnson, to secure Dilaudid. Harden asked the confidential informant if he wanted Dilaudid and when he replied affirmatively he fetched the narcotics from the rear of the residence. The two officers undertook another surveillance and again observed people coming and going from the two apartments. They then executed the affidavit.

The reliable informant reported that Dilaudid was available for sale in apartment F on at least two occasions. The second report was on August 24, the same day that the search warrant was obtained. Although the cache of drugs was not observed by the informant, a sufficient amount was available for sale on two occasions. Probable cause was established by the fact that a retail quantity was present on the date of the warrant and on a prior occasion.

It is contended that the affidavit contains misrepresentations which invalidate the warrant. Officer McNeil knew the informant through officer Peralta. McNeil did not know that the informant had been used on a prior occasion. However, on that occa-

sion the information was fruitless. It is contended that McNeil could not have sworn that the informant's information had led to arrests and convictions of persons engaged in narcotics traffic. The misrepresentation was not deliberate. Officer Peralta was familiar with the informant's reliability. After excising McNeil's unintentional misrepresentation, Peralta's knowledge was sufficient to establish probable cause. *State v. Rey*, 351 So.2d 489 (La.,1977).

Objection is made to the surveillance portion of the affidavit, because the entrance of apartment F, was not visible. The officers did see individuals coming and going toward what could only have been apartment F. Moreover, the surveillance portion of the affidavit is unnecessary to establish probable cause. Lack of corroboration for the informant does not invalidate the warrant, when the other details of the affidavit support a reasonable inference of reliability. *State v. Paciera*, 290 So.2d 681 (La., 1974).

This assignment lacks merit.

ASSIGNMENTS OF ERROR NUMBER FOUR, ELEVEN AND FIFTEEN

These assignments relate only to defendant Johnson. Since her conviction must be reversed on the basis of assignment of error number sixteen, the questions raised are moot.

ASSIGNMENT OF ERROR NUMBER SEVEN

Defendants contend that the trial court should have severed the trials. The trial judge stated in denying the motion to sever that he would grant it during trial if it developed that the two defenses were antagonistic. Johnson did not testify tht the durgs were Kelly's and stated that she had never seen him with any drugs. Kelly did nto testify or present any evidence that exculpated him and inculpated Johnson. although alleged to be antagonistic, the two defendse were not. Defendants did not show that justice required a severance and no prejudice appears from the joint trial. LSA-C.Cr.P. art. 704; *State v. Bradford,* 367 So.2d 745 (La., 1978); *State v. McGraw,* 366 So.2d 1278 (La., 1978).

This assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER TEN

It is contended that the trial court erred in allowing officer David Peralta to testify beyond the scope of his expertise. Questions about normal dosage units in illegal sales, the quantity of tablets required to maintain a drug habit and how many pills might be taken in a day by an addict are said to be outside the witness's knowledge. The trial court found the witness to be an expert in the packaging and

distribution of controlled dangerous substances. The trial court did not abuse its discretion in allowing the questions. *State v. Carter,* 347 So. 2d 236 (La., 1977).

This assignment lacks merit.

ASSIGNMENTS OF ERROR NUMBER TWELVE

Defendant Johnson contends that a mistrial should have been granted. Kelly's attorney asked whether known drug addicts had been seen entering or leaving Johnson's apartment, and the trial court did not allow an answer to the question.

Kelly contends that this prejudiced his defense, because he could have established that others were responsible for any narcotics found in the residence. It is argued that the evidence was also relevant to the question of whether he had a specific intention to distribute drugs.

Kelly's guilt rested on the fact that he was found with the drugs. Officer Peralta testified that an addict would need at the most approximately two Dilaudids a day and four Preludin. Addicts generally keep only a two or three day supply of drugs. According to Peralta, the amount possessed by Kelly had a street value of between $3,500 a $3,600. An intention to distribute narcotics can be inferred from the quanti-

ty in Kelly's possession. *See U.S. v Staten*, 581 F.2d 878 (D.C.Cir. 1978) and *State v. Sibley*, 310 So.2d 100 (La., 1975). Compare *State v. House*, 325 So.2d 222 (La., 1976) and *State v. Harveston*, 389 So.2d 63 (La., 1980). Any evidence of other narcotics offenders at the residence was immaterial evidence of other offenses, which was properly excluded by the trial judge.

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER FOURTEEN

It is contended that the trial court erred in denying a motion for the jury to view the crime scene. A view would allegedly have clarified the evidence about the layout of the two apartments. The matter was within the trial court's discretion. LSA-C.Cr.P. art. 762. There was no abuse of discretion because the evidence about the relative locations of the two apartments and their interior designs was sufficiently clear. *State v. Gallow*, 338 So.2d 920 (La., 1976).

The assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER SIXTEEN

Defendant Johnson contends that there as in-

sufficient evidence to find her guilty beyond a reasonable doubt of possession of the drugs. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

The drugs were not in Johnson's possession.[2] She lived in the apartment where Kelly was found with them. The officers at the front door had not knocked or announced their presence. Johnson attempted to exit at that door after hearing a loud noise by police at her sister's back door. It can be inferred that she was fleeing the scene because she was going away from the police noise at the back. Since there was nothing to warn Johnson that police were also at the front door of her apartment, her encounter with them at that door must be viewed as accidental. The inference that Harden Johnson was aiding Kelly's disposal efforts is unjustified.

Proximity to a drug or association with a possessor may establish a prima facie case of drug possession when colored by other evidence. United States v. Staten, 581 F.2d 878 (D.C. Cir. 1978). However, mere association or proximity, without

2. It should be noted that the information concerning Johnson's sister obtaining drugs from Johnson was contained only in the affidavit and was not evidence presented to the jury.

more, is insufficient. *Arellanes v. United States*, 302 F.2d 603 (9th Cir. 1962); *State v. Cann*, 319 So.2d 396 (La., 1975). Dominion over the illegal substance must be proven. *State v. Walker*, 369 So.2d 1345 (La.,1979). Active cooperation in an attempt at drug disposal is adequate other evidence. *United States v. Jackson*, 423 F.2d 506 (9th Cir. 1970). The factor is not present here. The only color of other evidence is Johnson's attempted exit from the apartment. Flight can show consciousness of guilt. *State v. Bolton*, 354 So.2d 516 (La., 1978). However, flight alone, particularly that here, where there was no question of hot pursuit, is insufficient. *See State v. Alford*, 323 So.2d 788 (La., 1975) where evidence of flight was insufficient even though there was hot pursuit.

Kelly was seen with his hand in the commode disposing of the only drugs in the apartment. He had possession of them. The only evidence that Johnson shared that possession is her attempt to leave the scene.

If Harden Johnson knew Kelly possessed the drugs, this would explain her flight but would not suffice to prove constructive possession. The crucial element of control over the illegal substance would be missing. *See United States v. DiNovo*, 523 F.2d 197 (7th Cir.1975); *United States v. Watkins*, 519 F.2d 294 (D.C.Cir.1975); *United States v. Bonham*, 477 F.2d

1137 (3rd Cir. 1973); and, *Montoya v. United States*, 402 F.2d 847 (5th Cir. 1968). A rational trier of fact could not have found Harden Johnson guilty beyond a reasonable doubt of possession of Preludin and Dilaudid, and her conviction must be reversed.

ASSIGMENT OF ERROR NUMBER TWENTY-ONE

Defendants contend that the trial court erred in not calling Barbara Jean Allen to the witness stand in the presence of the jury. Barbara Jean Allen had been examined twice outside the presence of the jury and answered some questions but invoked her Fifth Amendment privilege against self-incrimination as to most inquiries. Her attorney stated that any testimony about the event of August 23 or 24 would be incriminating to the witness and that she invoked the Fifth Amendment in relation to such questions. The questions the witness answered outside the presence of the jury were irrelevant to any issues in the trial.

It is contended that failure to force the witness to invoke her privilege before the jury restricted the defendant's constitutional right to present a defense in violation of the Sixth Amendment to the United States Constitution, and Article 1, Section 16, of the Louisiana Constitution of 1974. It is reversible error

to allow a witness to claim a blanket privilege. *State v. Wilson*, 394 So.2d 254 (La., 1981). However, when it is clear to the trial court that the silence of a witness is justified as to a particular evening because any testimony could be injurious, a question by question assertion of the privilege is unnecessary. *State v. Darby, —So.2d— (La.,1981). It is improper to call a witness to the stand solely to impress upon the jury the fact that the witness will claim the privilege against self-incrimination. State v. Berry*, 324 So.2d 822 (La., 1975); *State v. Day, docket no. 80-KA-2766, —So.2d— (La., 1981).*

Once it was determined that witnesses Allen would invoke the Fifth Amendment as to all questions relative to August 23 or 24, the trial court did not err in refusing to have her testify before the jury, State v. Darby, supra. The rights of confrontation and cross-examination are guaranteed. *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed. 2d 934 (1965). However, none of the statements by this witness bore on a fundamental part of the State's case and they would not have bolestered the defense. *Douglas, supra.* Defendants were not denied testimony which would have been relevant and material to their defense. Compare *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). It may be trial error, but not necessarily reversible error to require a witness to answer questions in front of the jury which

the witness will refuse to answer on the ground of self-incrimination. *Namet v. United States*, 373 U.S. 179, 83 S.Ct. 1151, 10 L.Ed.2d 278 (1963). The better policy is an examination outside the presence of the jury such as that conducted by the trial court here. *See United Sttes v. Lacouture*, 495 F.2d 12347 (5th Cir. 1974); *United States v. Johnson*, 488 F.2d 1206 (1st Cir. 1973); and, *United States v. Bowman*, 636 F.2d 1003 (5th Cir. 1981). The trial court did not err in not requiring the witness to invoke the privilege in front of the jury.

This assignment lacks merit.

ASSIGNMENTS OF ERROR NUMBER NINETEEN AND TWENTY

Defendant Kelly contends that the trial court erred in finding him to be a third offender.[3] LSA-R.S. 15:529.1.

The primary issue is whether defendant Kelly was properly advised of this consitutional rights as required by *Boykin v. Alabama*, 395 U.S. 238, 99 S.Ct. 1709 (1969), at the time of his 1972 conviction. As to his privilege against self-incrimination, defendant was

3. A 1960 conviction at which Kelly's lawyer was allowed to withdraw as counsel was not considered.

told: "When you plead guilty, you lose or give up certain rights .... You lose your right to remain silent because when you plead guilty you're not remaining silent. Do you understand that?" *State v. Martin*, 382 So.2d 933 (La.,1980) held that similar advice was insufficient since it did not adequately advise the defendant of his right to remain silent at a later trial after his plea.[4] However, *Martin* dealt with a 1976 conviction. In all recent Louisiana felony cases, the record must affirmatively show that the defendant was adequately advised of the three rights prescribed by Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1971). *State v. Williams*, docket no. 80-K-2345, — So.2d — (La., 1981). In the case of pleas entered more than six years ago, the record must show only that the defendant voluntarily pleaded guilty with a full understanding of "the connotation and consequences". *State v. Cusher*, docket no. 80-K-2518, — So.2d — (La., 1981); *State v. Warren a/k/a Mason*, docket no. 80-K-2375, — So.2d — (La., 1981). Defendant here was adequately advised of his rights. His plea was knowing and voluntary. The trial court did not err in using the 1972 conviction to find defendant Kelly to be multiple offender.

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4. *Martin* was overruled in *State v. Williams*, 392 So.2d 448 (La., 1980) which held that a defendant cannot collaterally attack his prior conviction in a trial under LSA-R.S. 14:95.1 for possession of a firearm by a convicted felon.

It is also contended that a 1963 plea was defective because defendant was not accompanied by counsel. *State v. Coody*, 275 So.2d 773 (La., 1973). The minute entry for that conviction reflects that the Legal Aid Bureau was appointed as counsel for Kelly the day before his guilty plea was entered. Defendant was afforded counsel. He was entitled to waive the presence of that counsel when he entered is guilty plea. Kelly was accompanied by Harry F. Connick, attorney, when he was sentenced in 1963. The 1963 conviction was properly considered to enhance Kelly's sentence.

The testimony of police officer Glen Burmeister, a fingerprint expert, adequately established that defendant, James Kelly, is one and the same as the James Kelly previously convicted.

For the foregoing reasons, the convictons of defendant, Harden Johnson, for possession of Preludin a Dilaudid are reversed and vacated. The convictions and sentence of defendant, James Kelly, for possession of Dilaudid and Preludin with intent to distribute those drugs are affirmed.

REVERSED AS TO DEFENDANT HARDEN JOHNSON: AFFIRMED AS TO DEFENDANT JAMES KELLY.

SUPREME COURT OF LOUISIANA
NO. 81-KA-0033

STATE OF LOUISIANA
versus
HARDEN JOHNSON and JAMES KELLY

LEMMON, Justice, Dissenting as to Reversal of Conviction of Harden Johnson.

I disagree that there was insufficient evidence to prove defendant Johnson's guilt beyond a reasonable doubt.

The evidence raises the inference that Ms. Johnson, after hearing the police knock on the door of the adjoining apartment, either was fleeing the scene or delaying the police while Kelly flushed the drugs down the toilet. Either possibility points unmistakenly to Ms. Johnson's guilty knowledge of the presence of drugs in her own apartment.

Under the circumstances shown by the evidence and the inferences reasonably drawn therefrom, a ra-

tional trier of fact could conclude beyond a reasonable doubt that Ms. Johnson actively participated in Kelly's possesion of the drugs. I would affirm the conviction based on the responsive verdict of guilty of possession.[1]

1. The jury apparently concluded that the evidence was not sufficient to support the conclusion beyond a reasonable doubt that Ms. Johnson had acted with the specific intent to distribute the drugs.

Opposition

Supreme Court, U.S.
FILED
MAR 25 1982
ALEXANDER L. STEVAS
CLERK

NO. 81-1132

In the Supreme Court of the United States

October Term, 1981

JAMES KELLY,

Petitioner

VS.

STATE OF LOUISIANA,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

No. 81-1132

JAMES KELLY,

Petitioner

VS.

STATE OF LOUISIANA,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

STATEMENT OF THE CASE

On August 24, 1978, officers of the New Orleans Police Department served a search warrant on 2705 Belmont Street, apartments "E" and "F", in the City of New Orleans. A quantity of tablets proscribed by Louisiana's Controlled Dangerous Substances statutes were seized from apartment "F". Petitioner,

James Kelly was present in that apartment at the time of the search and seizure. He was arrested and charged with possession of narcotics with intent to distribute, a violation of Louisiana Revised Statute 40:969. Petitioner was tried before a twelve member jury on November 21 and 22, 1978. He was found guilty as charged. Following a hearing on June 18, 1979, petitioner was determined to be a multiple offender pursuant to La.R.S. 15:529.1 and was sentenced to serve twenty years in the custody of the Director of the Louisiana Department of Corrections.

Petitioner appealed his conviction and sentence to the Louisiana Supreme Court which affirmed both on September 8, 1981. (NO. 81-KA-0033). Petitioner was denied a rehearing on October 16, 1981.

ARGUMENT

Petitioner alleges that the convictions used by the trial court in determining that he was a multiple offender were constitutionally infirm. In proving that petitioner was a multiple offender, the State relied upon two prior conviction, one from 1963 and one from 1972. Petitioner alleges that both of those convictions were unconstitutional and should not have been accepted by the trial court in the enhancement proceeding.

Petitioner argues that he was not represented by counsel when he pled guilty in 1963. The record belies that allegation. The minute entry for the date petitioner pled guilty in 1963 clearly indicates that appellant was represented by counsel. The reverse of the bill of information reads:

"Arraigned July 29, 1963 and pleaded guilty."

The minute entry for that date reads:

> "July 29/63
> "The Court appointed the Legal Aid Bureau as counsel for accused.
> "The Court ordered plea recorded and accused remanded for sentence Tuesday, July 30th 1963."
> (State Court Record, p. 62)

It is obvious, therefore, that petitioner was represented by counsel when the plea of guilty was entered. That conviction was lawfully used to enhance petitioner's sentence. *Burgett v. Texas*, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

Petitioner also claims that the record does not support the finding of both the trial court and the Louisiana Supreme Court that the plea of guilty in 1972 was constitutional. Specifically, petitioner maintains that he was not adequately informed of his privilege against self-incrimination and his right to compulsory process.

When petitioner pled guilty in 1972, the trial judge conducted the following interview with petitioner:

BY THE COURT:
Are you James Kelly, Jr.?

BY THE DEFENDANT:
Yes, sir.

BY THE COURT:
How old are you?

BY THE DEFENDANT:
Thirty-four.

BY THE COURT:
Where were you born?

BY THE DEFENDANT:
New Orleans.

BY THE COURT:
What's the date of your birth?

BY THE DEFENDANT:
1938, April 16th.

BY THE COURT:
Do you know where your parents were born?

BY THE DEFENDANT:
My mother was born in Mississippi; my father was born in Louisiana.

BY THE COURT:
You were originally charged in this case, along with Anita Lynn Kelly, with possession of heroin with the intent to distribute. Your attorney pled guilty to possession of

heroin which was accepted by the District Attorney. Is that your plea - guilty to possession of heroin?

BY THE DEFENDANT:
Yes, sir.

BY THE COURT:
When you plead guilty, you lose or give up certain rights to a trial by jury, the right to see the witnesses against you and interrogate them, cross examine them, you and/or your lawyer. You lose your right to remain silent because when you plead guilty you're not remaining silent. Do you understand that?

BY THE DEFENANT:
Yes, sir.

BY THE COURT:
You also lose your right to take an appeal if you were found guilty because since there is no trial there is nothing from which to appeal. Do you understand that and you are willing to give up that right?

BY THE DEFENDANT:
Yes, sir.

BY THE COURT:
By pleading guilty, you waive, give up, lose, forfeit or whatever you want to call it all of the rights that I've just explained to you. Are you satisfied to do that?

BY THE DEFENDANT:
Yes, sir.

BY THE COURT:
For this offense you could get five years at hard labor or a fine of one thousand dollars or both. Do you understand that:

BY THE DEFENDANT:
Yes, sir.

BY THE COURT:
And you are pleading guilty because in fact you are guilty of this offense?

BY THE DEFENDANT:
Yes, sir.

BY THE COURT:
Did anybody force you to do this, threaten you in any way to make you plead guilty?

BY THE DEFENDANT:
No, sir.

BY THE COURT:
You're doing it voluntarily?

BY THE DEFENDANT:
Yes, sir.

(State Court Record, pp. 69-72)

This colloquy was sufficient for the trial judge to determine that petitioner was aware of the connotations and consequences of his plea of guilty.

The proposition inherent in petitioner's argument is that express waivers of three specific constitutional guarantees are necessary before a guilty plea can be properly entered against a defendant. This proposition finds its roots in a number of decisions of the Louisiana Supreme Court interpreting *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

In *Boykin*, this Honorable Court held that it was "error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary." 395 U.S. at 242, 89 S.Ct. at 1711, 23 L.Ed.2d at 279.

This Court went on to note that the waiver of several federal constitutional rights is involved in a plea of guilty:

> "First is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth . . . .Second, is the right to trial by jury . . . .Third, is the right to confront one's accusers . . . .We cannot presume a waiver of these three important federal rights from a silent record." 395 U.S. at 243, 89 S.Ct. at 1712.

Boykin does not, however, require that the judge explicity inform the defendant of each of those three rights before accepting a guilty plea. *Barksdale v. Blackburn*, No. 80-3782 (5th Cir. 1982); *Brown v. Jernigan*, 622 F.2d 914 (5th Cir. 1980), cert. denied, 449 U.S. 958, 101 S.Ct. 368, 66 L.Ed.2d 224; *McChesney v. Henderson*, 482 F.2d 1101 (5th Cir. 1973), cert. denied, 414 U.S. 1146, 94 S.Ct. 901, 39 L.Ed.2d 109; see also *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970).

Nevertheless, the Louisiana Supreme Court, from it first embrace of *Boykin* in *State ex rel. Jackson v. Henderson*, 255 So.2d 85 (La. 1971), has required that pleas of guilty be accompanied by express waivers of those three constitutional rights.[1]

As if in recognition that the litany required by *State ex rel. Jackson v. Henderson* is a mere embellishment upon *Boykin*, the Louisiana Supreme Court has ruled that the requirement, although purported to be

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1. In his application, petitioner refers to the right to compulsory process as another required right, citing *State v. Lewis*, 367 So.2d 1155 (La. 1969). In a footnote to that decision, the Louisiana Supreme Court rejected compulsory process as one of the rights, a waiver of which is required, because it was not mentioned in *Boykin*. 367 So.2d at 159, Fn. 2.

of constitutional significance is not retroactive and is only to be applied to pleas of guilty from Louisiana courts. Pleas of guilty before the date of *State ex rel. Jackson v. Henderson*, all federal pleas and all pleas from other states are, at most, only required to be demonstrably free and voluntary. *State v. Bolton*, 379 So.2d 722 (La. 1979); *State v. Holden*, 375 So.2d 1372 (La. 1979).

In order to enforce its own procedural requirement, the Louisiana Supreme Court directed that the only acceptable proof as to the correctness of the colloquy be a transcript of that colloquy. *State v. Jefferson*, 376 So.2d 77 (La. 1980).

In 1980, the Louisiana Supreme Court added an additional requirement that a defendant pleading guilty be informed that the privilege against self-incrimination extended to the right to remain silent at trial. *State v. Martin*, 382 So.2d 933 (La. 1980). Petitioner, on appeal to the Lousiana Supreme Court relied heavily upon that hypertechnical requirement which has since been repudiated by the Louisiana Supreme Court. *State v. Bowick*, NO. 80-KA-2793, _____ So.2d _____ (La. 1981); *State v. Williams*, 392 So. 2d 448 (La. 1980).

The Louisiana Supreme Court has begun to

back down on other facets of its extension of *Boykin*. As the Louisiana Supreme Court pointed out in its opinion in the instant case, the litany requirement is now imposed only in recent Louisiana felony cases. *State v. Williams,* NO. 80-K-2345, _____ So.2d _____ (La. 1981). In the case of pleas more than six years old, the record must only demonstrate the essential requirement of *Boykin,* that the defendant voluntarily pled guilty with a full understanding of the connotation and consequences. *State v. Cusher,* NO. 80-K-2518, _____ So.2d _____ (La. 1981).

The colloquy in the instant case demonstrates that the judge not only made certain that petitioner was entering the plea of guilty freely, intelligently, and with awareness of its connotation and consequences in compliance with *Boykin* but also insured that petitioner was aware that he was waiving the three constitutional rights as required by the stricter Louisiana requirements, recent developments in the law notwithstanding.

CONCLUSION

The two pleas of guilty introduced against petitioner in the multiple offender proceeding were constitutionally sound. His allegations of error are, con-

sequently, without merit. His petition for a writ of certiorari to the Supreme Court of Louisiana should be denied.

Respectfully submitted,

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